STATE OF SOUTH CAROLINA)
)
(Caption of Case))
Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Incorporated d/b/a AT&T South Carolina d/b/a AT&T Southeast)

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET NUMBER: 2007 - 215 - C

(Please type or print)
Submitted by: Patrick W. Turner

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DOCKETING INFORMATION (Check all that apply)

☐ **Emergency Relief demanded in petition**

☐ **Request for item to be placed on Commission's Agenda expeditiously**

☐ **Other:**

INDUSTRY (Check one)

- ☐ Electric
- ☐ Electric/Gas
- ☐ Electric/Telecommunications
- ☐ Electric/Water
- ☐ Electric/Water/Telecom.
- ☐ Electric/Water/Sewer
- ☐ Gas
- ☐ Railroad
- ☐ Sewer
- ☒ Telecommunications
- ☐ Transportation
- ☐ Water
- ☐ Water/Sewer
- ☐ Administrative Matter
- ☐ Other:

NATURE OF ACTION (Check all that apply)

- ☐ Affidavit
- ☐ Agreement
- ☐ Answer
- ☐ Appellate Review
- ☐ Application
- ☒ Brief
- ☒ Certificate
- ☐ Comments
- ☐ Complaint
- ☐ Consent Order
- ☐ Discovery
- ☐ Exhibit
- ☐ Expedited Consideration
- ☐ Interconnection Agreement
- ☐ Interconnection Amendment
- ☐ Late-Filed Exhibit
- ☒ Letter
- ☐ Memorandum
- ☐ Motion
- ☐ Objection
- ☐ Petition
- ☐ Petition for Reconsideration
- ☐ Petition for Rulemaking
- ☐ Petition for Rule to Show Cause
- ☐ Petition to Intervene
- ☐ Petition to Intervene Out of Time
- ☐ Prefiled Testimony
- ☐ Promotion
- ☐ Proposed Order
- ☐ Protest
- ☐ Publisher's Affidavit
- ☐ Report
- ☐ Request
- ☐ Request for Certification
- ☐ Request for Investigation
- ☐ Resale Agreement
- ☐ Resale Amendment
- ☐ Reservation Letter
- ☐ Response
- ☐ Response to Discovery
- ☐ Return to Petition
- ☐ Stipulation
- ☐ Subpoena
- ☐ Tariff
- ☒ Other: Exhibits

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at&t

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September 14, 2007

The Honorable Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: In the Matter of Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS for Arbitration of Rates, Terms, and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina, d/b/a AT&T Southeast
Docket No. 2007-215-C

Dear Mr. Terreni:

Enclosed for filing are an original and one (1) copy of BellSouth Telecommunications, Inc.'s d/b/a AT&T South Carolina ("AT&T") Post-Hearing Brief in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this document as indicated on the attached Certificate of Service.

Sincerely,

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
DM5 #690235

THIS DOCUMENT IS AN EXACT DUPLICATE OF THE E-FILED COPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS.

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS for Arbitration of Rates, Terms, and Conditions of Interconnection with BellSouth Telecommunications, Inc., d/b/a/ AT&T South Carolina, d/b/a AT&T Southeast	)	Docket No. 2007-215-C

AT&T SOUTH CAROLINA'S POST-HEARING BRIEF

BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina ("AT&T South Carolina") respectfully submits its Post-Hearing Brief and Proposed Order in this proceeding.[1] As explained below, Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS (collectively "Sprint") and AT&T South Carolina each have presented an issue for the Public Service Commission of South Carolina ("the Commission") to consider in this proceeding. This Brief explains why the Commission should reject Sprint's positions and accept AT&T South Carolina's positions on both issues.

INTRODUCTION

Sprint and AT&T South Carolina currently operate under an interconnection agreement that became effective in 2001.[2] The initial, fixed term of the 2001 agreement

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1 Attachment A to this Brief is AT&T South Carolina's Proposed Order.

2 Tr. at 94-96.

expired December 31, 2004.[3] In 2004, Sprint and AT&T South Carolina began actively negotiating provisions of a subsequent interconnection agreement that would govern their operations in South Carolina on a going-forward basis.[4] During these negotiations, the parties have continued operating under the 2001 agreement on a month-to-month basis in order to avoid disruption of service to Sprint's end user customers.[5] On December 14, 2006, the parties reached a tentative settlement that each agreed was "a milestone," and the parties agreed that "final settlement is likely in the next few weeks."[6]

Two weeks later, however, Sprint stopped working on finalizing contract language consistent with the parties' successful negotiations and, instead, insisted on extending the 2001 agreement into the year 2010.[7] Sprint based its change of course on a Merger Commitment the Federal Communications Commission ("FCC") adopted and approved in its BellSouth/AT&T "Merger Order."[8] That Merger Commitment states, in relevant part:

> [AT&T South Carolina] shall permit [Sprint] to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years . . . .[9]

Sprint contends that this Merger Commitment allows it to extend the 2001 agreement three years from either Mach 20, 2007 (the date of its request for an extension) or from December 29, 2006 (the date of AT&T's letter to the FCC setting forth the

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3 Tr. at 67; Tr. at 94; Composite Hearing Exhibit 2 (PLF-3 at page 1 of 2).

4 Tr. at 28 (page 6 of Sprint Direct), Tr. at 96.

5 Tr. at 78-79; Tr. at 81; Tr. at 95-96; Composite Hearing Exhibit 2 (PLF-3 at page 1 of 2).

6 Hearing Exhibit 4.

7 Tr. at 112-113.

8 Memorandum Opinion and Order, *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, 22 F.C.C.R. 5662 at ¶222, Appendix F (March 26, 2007)("*Merger Order*").

9 *See* Hearing Exhibit 3 at p. 3, Item 4 (emphasis added).

commitment).[10] AT&T agrees that the Merger Commitment allows Sprint to extend the 2001 agreement for three years, but AT&T believes the extension begins when the "initial term" of the 2001 agreement "expired" on December 31, 2004. In other words, the parties disagree about when the parties will stop operating under the 2001 agreement and start operating under a new agreement in South Carolina.[11]

Accordingly, Sprint filed its Petition for Arbitration ("Petition") "[p]ursuant to Section 252(b) of the Telecommunications Act of 1996" ("the federal Act").[12] Sprint's Petition presents the sole issue of whether Sprint can extend the 2001 agreement for three years "from March 20, 2007 pursuant to Interconnection Merger Commitment No. 4."[13] AT&T South Carolina filed a Motion to Dismiss and, in the Alternative, Answer ("Motion/Answer"), challenging Sprint's ability to present its issue in this Section 252 proceeding and presenting AT&T South Carolina's issue of whether the Commission should require Sprint to execute the agreement AT&T South Carolina has submitted for the Commission's consideration.[14] Sprint has not presented any specific concerns regarding any of the contract language AT&T South Carolina submitted, and Sprint has not presented any proposed contract language for the Commission's consideration.

The remainder of this Brief is organized in the following manner. Section I of this Brief summarizes how AT&T South Carolina is requesting the Commission to rule on these issues. Section II of this Brief explains why the Commission should reject Sprint's positions regarding the issue Sprint presented. Section III of this Brief explains

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10 Tr. at 35-36 (Sprint direct at 13-14).
11 *See, e.g.,* Tr. at 6; Tr. at 67.
12 *See* Petition at p. 1.
13 Id. at p. 8.
14 *See* Motion/Answer at ¶28 to end.

why the Commission should adopt AT&T South Carolina's position (and the contract it submitted) regarding the issue AT&T South Carolina presented.

I. SUMMARY OF HOW AT&T SOUTH CAROLINA IS ASKING THE COMMISSION TO RULE ON EACH ISSUE.

For the reasons explained in Section II below, AT&T South Carolina asks the Commission to make one or more of the following rulings regarding the sole issue Sprint has presented:

1. Sprint cannot raise the issue it presented in this Section 252 arbitration proceeding;

2. Even if Sprint could properly raise the issue it presented in this Section 252 arbitration proceeding, the FCC has exclusive jurisdiction to interpret and enforce the Merger Commitment;

3. Even if Sprint could properly raise the issue it presented in this Section 252 arbitration proceeding, and even if the FCC does not have exclusive jurisdiction to interpret and enforce the Merger Commitment, the Commission will not address Sprint's issue because judicial economy, uniformity, and certainty all are best served by having the FCC address Sprint's issue; and/or

4. If Sprint can raise its issue in this proceeding, if the FCC does not have exclusive jurisdiction, and if the Commission decides to address Sprint's issue, the plain language of the Merger Commitment shows that the three-year extension period for Sprint began on December 31, 2004.

If the Commission makes one or more of these rulings, it will then be necessary for the Commission to address the issue AT&T South Carolina presented in its Motion/Answer.

With regard to that issue, and for the reasons explained in Section III below, AT&T South Carolina asks the Commission to rule that unless and until the FCC affirmatively agrees with Sprint's interpretation of the Merger Commitment, Sprint must execute the interconnection agreement submitted by AT&T South Carolina (including AT&T South Carolina's standard Attachment 3) with an effective date of January 1,

2008. This would give Sprint the benefit of the three-year extension contemplated by the Merger Commitment while ensuring that the parties will operate under an updated agreement following the expiration of that extension.

II. THE COMMISSION SHOULD NOT ADDRESS SPRINT'S ISSUE OR, IN THE ALTERNATIVE, IT SHOULD RULE THAT THE PLAIN LANGUAGE OF THE MERGER COMMITMENT SHOWS THAT THE THREE-YEAR EXTENSION PERIOD FOR SPRINT BEGAN ON DECEMBER 31, 2004

As explained below, Sprint has presented an issue that is not subject to arbitration under Section 252 of the federal Act and that is within the exclusive jurisdiction of the FCC. Even if that were not the case, judicial economy, uniformity, and certainty all are best served by having the FCC (as opposed to multiple State commissions) address Sprint's issue. Alternatively, the plain language of the Merger Commitment supports AT&T South Carolina's position and is contrary to Sprint's position.

A. Sprint cannot raise the issue it presented in this section 252 arbitration proceeding.

As the Commission recently ruled, not every issue that a party negotiating an interconnection agreement may attempt to present is subject to arbitration under the federal Act.[15] Instead, the federal Act plainly states that arbitration proceedings can only resolve "open issues"[16] in a way that "meet[s] the requirements of Section 251 . . . ."[17]

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[15] *See* Order Addressing Changes of Law, *In Re Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Order No. 2006-136 in Docket No. 2004-316-C (March 10, 2006)("Change of Law Order"). In that Order, the Commission declined to allow a number of CLECs to present issues that arose under Section 271 of the Act in a Section 252 proceeding, finding that "Congress limited the Section 252 rate-setting, negotiation, arbitration, and approval process to Section 251 obligations." *Id.* at 6.

[16] Sprint's witness acknowledges that only "open issues" are subject to arbitration under the federal Act. Tr. at 64-65.

Thus, in addressing which types of issues can be arbitrated pursuant to Section 252, the Tenth Circuit Court of Appeals stated that "[b]ecause a CLEC may only compel arbitration of issues that the ILEC is under a duty to negotiate pursuant to § 251(c)(1), the "interconnection agreements" that result from arbitration necessarily include only the issues mandated by § 251(b) and (c)."[18] Likewise, the United States District Court for the District of Arizona recently held that the Arizona Commission could not "impose Section 271 requirements into an arbitrated [interconnection agreement] under Section 252 [because] Section 252 clearly states that state commissions are to resolve open issues by imposing conditions that meet the requirements of Section 251", and no such requirements are found in Section 251.[19]

The undisputed evidence reveals that the sole issue in Sprint's Petition – when do the parties stop operating under the 2001 agreement and start operating under a new agreement – is not an "open issue" but, to the contrary, is an issue upon which the parties reached agreement during negotiations. Additionally, Sprint's sole issue indisputably does not address any "requirement of Section 251" but, instead, it addresses a separate, distinct, and voluntary Merger Commitment that goes beyond anything required by the federal Act. Sprint, therefore, cannot properly raise its issue in this arbitration proceeding.

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17 47 U.S.C. § 252(c)(1) (emphasis added).

18 *Qwest Corp. v. Public Utilities Com'n of Colorado*, 479 F.3d 1184, 1197 (10th Cir. 2007) (citing *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (emphasis added).

19 *Qwest Corp. v. Arizona Corporation Commission, et* al., 496 F.Supp.2d 1069, 1077 (D.Ariz.2007). *See, also, DIECA Communications, Inc. v. Florida Public Service Commission*, 447 F.Supp.2d 1281, 1286 (N.D.Fla. 2006) (emphasis added) (asserting that in accordance with the plain meaning of the statute, state commission resolution of issues in arbitration must be based on obligations under § 251).

1. Sprint has not presented an "open issue."

Sprint's witness acknowledges that the parties' negotiations began in 2004, when Sprint sent AT&T South Carolina a letter asking for negotiation of a subsequent interconnection agreement (not an extension of the existing agreement).[20] Following extensive negotiations, Sprint confirmed a tentative settlement by email dated December 14, 2006.[21] Sprint claims that some of the details of the tentative settlement still had to be worked through and that "three or four" issues remained open.[22]

However, it is undisputed – and, in fact, confirmed by Sprint's own email – that one of the issues to which the parties agreed was the effective date of the new agreement.[23] In other words, negotiations resulted in Sprint and AT&T South Carolina agreeing on the date upon which the parties would stop operating under the 2001 interconnection agreement and start operating under the new interconnection agreement. Further, Sprint's own witness confirmed that the issue of extending the 2001 agreement for three years did not come up until after the parties already had agreed to an effective date of the new agreement.[24] Sprint's witness also confirmed that the issue of extending the 2001 agreement for three years did not arise as a result of anything that was discussed previously during negotiations, but instead it "arose as a direct result, and solely as a

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20 Tr. at 28 (page 6 of Sprint Direct); Tr. at 68-69.

21 See Hearing Exhibit 4. In his post-Petition testimony, Sprint's witness testifies that "a new agreement was far from finalized" and that "voluntary agreement was uncertain." Tr. at 60. Sprint's contemporaneous email, however, is of a markedly different tone, stating that "this is a milestone" and that "final settlement is likely in the next few weeks." *See* Hearing Exhibit 4.

22 See Tr. at 77-78.

23 *See* Hearing Exhibit 4.

24 *See* Tr. at 72, 82-83 (Sprint's witness testifying that the first time the issue of extending the 2001 agreement for three years came up was on "January 3rd [2007] or soon after that.").

direct result of the [subsequent] Merger Commitment."[25] As Sprint's own witness candidly put it, "[t]hat was very opportune for Sprint, I would say."[26]

In addition to these facts of record, and as the Florida Commission recently ruled, the nature of the remedy sought by Sprint reveals that Sprint has not presented an "open issue" to the Commission. As the Florida Commission explained, "the nature of the remedy [Sprint seeks] is an enforcement of an allegedly known right, not a determination of an open issue to comport with the requirements of Section 251."[27] The Florida Commission, therefore, dismissed Sprint's Petition for Arbitration.

The issue Sprint attempts to raise, therefore, simply is not an "open issue," and Sprint cannot properly raise that issue in this Section 252 arbitration proceeding.

2. Sprint's issue does not address a requirement of Section 251 of the federal Act.

As noted above, the Commission has found that "Congress limited the Section 252 rate-setting, negotiation, arbitration, and approval process to Section 251 obligations,"[28] and this finding "is consistent with federal court rulings."[29] The record

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25 Tr. at 74.

26 *Id.*

27 *See* Order Granting Motion to Dismiss, *In re: Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast*, Order No. PSC-07-0680-FOF-TP in Docket No. 070249-TP at 4 (August 21, 2007)("Florida Order")(emphasis in original). Attachment B to this Brief is a copy of this Order.

28 Change of Law Order at 6.

29 Id. at n. 24, citing *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 488 (5th Cir. 2003)("An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§251 and 252."); *MCI Telecom. Corp. v. BellSouth Telecom. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002)(holding that a requirement that an ILEC like BellSouth negotiate items that are outside of Section 251 is "contrary to the scheme and

reveals that the sole issue Sprint raises in its Petition simply does not address any Section 251 obligation. Sprint, therefore, cannot present its issue in this Section 252 proceeding.

Sprint's actions prior to the hearing confirm that the issue it presents is based solely on the language of the Merger Commitment and not on any obligation imposed by Section 251. Sprint's letter of March 20, 2007, for instance, is couched in terms of a "request pursuant to FCC approved AT&T/BellSouth Merger Commitment No. 4 to extend parties' Interconnection Agreement three years to March 19, 2010."[30] In its Petition for Arbitration, Sprint frames the issue in terms of its request to extend the 2001 agreement for three years "from March 20, 2007 pursuant to Interconnection Merger Commitment No. 4."[31]

Sprint's testimony during the hearing further confirms that Sprint's issue is based solely on the Merger Commitment and not on any obligation imposed by Section 251. Sprint's witness acknowledged that no language in Section 251 of the federal Act explicitly requires an ILEC like AT&T South Carolina to allow a CLEC like Sprint to extend an existing interconnection agreement by three years.[32] Sprint's witness further acknowledged that that no language in the 2001 interconnection agreement requires such an extension.[33] Instead, as Sprint's witness confirmed, Sprint' issue "arose as a direct result, and solely as a direct result of the Merger Commitment."[34]

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the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate.").

30 *See* Petition, Exhibit C. In its Motion/Answer, AT&T South Carolina admits that Exhibit C is a copy of Sprint's March 20, 2007 letter and proposed Amendment to the parties' 2001 interconnection agreement. *See* Motion/Answer at ¶18.

31 Petition at p. 8 (emphasis added).

32 Tr. at 65-66.

33 Tr. at 66-67.

34 Tr. at 74.

Sprint nevertheless tries to force the square peg of its exclusive reliance on the Merger Commitment through the round hole of this Section 252 arbitration proceeding by claiming that "Sprint considers the Merger Commitments to constitute AT&T South Carolina's latest offer for consideration within the parties' 251/252 negotiations that superseded or may be viewed in addition to any prior offers AT&T South Carolina had made . . . ."[35] As the Florida Commission found, however, "Sprint's theory for treating the enforcement of the particular Merger Commitment as an arbitration of an open Section 251 issue is, at best, awkward."[36] As was the case in the Florida proceeding, Sprint "offers no legal support for why the Merger Commitment 'must' be viewed as a 'standing offer' that automatically became inserted into Sprint's negotiations with AT&T."[37] Additionally, it would be particularly inappropriate to view the Merger Commitment as a "latest" or "superseding" offer in this case because, as explained above, AT&T and Sprint already had agreed to the effective date of the new agreement. Sprint's awkward theory, therefore, rings particularly hollow against the facts of record.

Clearly, the voluntary FCC merger commitment on which Sprint relies simply is not one of the requirements set forth in Section 251, and Sprint cannot properly present that issue in this Section 252 arbitration proceeding.

B. In the Alternative, the FCC has exclusive jurisdiction to interpret and enforce the Merger Commitment.

Sprint is asking the Commission to interpret the Merger Commitment consistent with Sprint's position and enforce that erroneous interpretation against AT&T South Carolina. However, interpretation and enforcement of this federal Merger Commitment

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35 Tr. at 33 (Sprint Direct at 11).
36 Florida Order at 5.
37 *Id.*

(that was presented to and approved by the FCC) falls under the exclusive jurisdiction of the FCC. The Commission, therefore, should dismiss Sprint's issue.

It is well settled that the Commission must possess jurisdiction over the parties, as well as the subject matter, in a proceeding[38] and that the Commission "possesses only the authority given it by the legislature."[39] Accordingly, the Commission should dismiss a request for relief if it asks the Commission to address matters over which it has no jurisdiction or if it seeks relief that the Commission is not authorized to grant. That is exactly what Sprint is doing because, as explained below, neither state nor federal law grants the Commission jurisdiction over the Merger Commitment upon which Sprint relies.

The issue Sprint presents is not based on any South Carolina law. Instead, Sprint is asking a state agency to enforce Sprint's erroneous interpretation of a federal Merger Commitment that is embodied in a federal agency's order. The United States Supreme Court has held that the interpretation of a federal agency order, when issued pursuant to the federal agency's established regulatory authority, falls within the federal agency's jurisdiction.[40] This pronouncement clearly applies to the FCC's *Merger Order*. Accordingly, if Sprint desires interpretation or enforcement of the Merger Condition, it must seek such interpretation or enforcement from the FCC.

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[38] *See, e.g., Mobley v. Bland*, 200 S.C. 448, 21 S.E. 2d 22 (1942) (to possess proper jurisdiction over the entirety of a case, the court must have both personal and subject matter jurisdiction).

[39] *South Carolina Cable Television Assoc. v. South Carolina Public Service Commission*, 313 S.C. 48, 52, 437 S.E. 2d 38, 40 (1993); *See also*, City of Camden v. Public Service Commission of South Carolina, 283 S.C. 380, 382, 323 S.E. 2d 519, 521 (1984) ([t]he Public Service Commission is a governmental body of limited power and jurisdiction, and has only such powers as are conferred upon it either expressly or by reasonably necessary implication by the General Assembly.").

[40] *Serv. Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 177 (1959).

The FCC made this clear when it explicitly reserved its own jurisdiction over the merger commitments that it approved in its *Merger Order*. Specifically, the FCC stated that "[f]or the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC and would apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter."[41] Nowhere in the *Merger Order* does the FCC provide that the interpretation or administration of the Merger Commitments is to occur outside the FCC. This is significant because, as Sprint points out, the FCC has included clear and unambiguous language in prior merger orders when it intended for State commissions to administer conditions set forth in those merger orders.[42] The absence of such language in the *Merger Order* adopting the Merger Commitment, therefore, is fatal to Sprint's position.

Moreover, while the federal Act grants state Commissions authority to interpret and resolve *specific* issues of federal law (for instance, the requirements of Section 251 in

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[41] *Merger Order* (Appendix F), p. 147 (emphases added). While a state Commission may have certain enforcement authority regarding interconnection agreements that it approves pursuant to the federal Act, that is not the case in this proceeding. The Merger Commitment was not (and could not be) negotiated or arbitrated pursuant to Section 251 or 252 of the federal Act, and it is not found in an interconnection agreement that has been approved by the Commission. Instead, the Merger Commitments is a wholly independent and voluntary commitment that is separate and apart from any Section 251 or 252 matter and are therefore not subject to state interpretation or enforcement.

[42] In its Order approving the *GTE/Bell Atlantic* merger, for instance, the FCC expressly stated that "the Applicants also agree that they will not resist the efforts of state commissions to administer the conditions by arguing that the relevant state commission lacks the necessary authority or jurisdiction." *See* Sprint's Response to AT&T South Carolina's Motion to Dismiss and Answer at p. 10 (citing *In the Matter of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control,* CC Docket No. 98-184, ¶348 (June 16, 2000). In contrast, the FCC included no such language suggesting any State commission role in administering or enforcing its Order approving the AT&T/BellSouth merger.

the context of an arbitration proceeding initiated pursuant to Section 252), the Act does not grant state Commissions any *general* authority to resolve and enforce purported violations of federal law or FCC orders.[43] This is apparent from the reasoning of the Florida Commission in dismissing a claim that was based on an alleged violation of Section 222 of the federal Act.[44] In dismissing that claim, the Florida Commission noted that it can construe and apply federal law "in order to make sure [its] decision under state law does not conflict" with federal law.[45] The Florida Commission, however, plainly and correctly noted that "[f]ederal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes" and that "[s]tate agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created."[46] Accordingly, in the *Sunrise Order*, the Florida Commission determined that while it can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law, it cannot provide a remedy (federal or state) for a violation of federal law,[47] which is what Sprint is improperly seeking in this proceeding.

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43 *See* 47 U.S.C. § 251.

44 *See In re: Complaint by Supra Telecommunications and Information Systems, Inc., against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information*, Dkt. No. 030349-TP, Order No. PSC-03-1392-FOF-TP (Dec. 11, 2003) ("*Sunrise Order*").

45 *Id.* at 3-4.

46 *See Sunrise Order* at 3 (citations omitted).

47 *Id.* at 5. The Florida Commission echoed these same principles in In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom LLC, Dkt. No. 031125-TP, Order No. PSC-04-0423-FOF-TP (Apr. 26, 2004), wherein it dismissed a request by a CLEC to find that BellSouth violated federal law. Based on the Sunrise Order, the Florida Commission dismissed the federal law count of the complaint, holding "[s]ince Count Five relies solely on a federal statute as the basis for relief, we find it appropriate to dismiss Count Five." *Id.*

For all of these reasons, the FCC alone possesses jurisdiction to interpret and enforce the Merger Commitment, and the Commission should dismiss Sprint's issue.

C. In the alternative, the Commission should not address Sprint's issue because judicial economy, uniformity, and certainty all are best served by having the FCC address Sprint's issue.

FCC Orders that address Section 251 requirements typically provide over-arching guidance that State commissions apply in order to reach state-by-state (and often, within a state, carrier-by-carrier) decisions on matters such as "impairment" and the appropriate rates for interconnection and unbundled network elements. In sharp contrast, the *Merger Order* does not address Section 251 requirements, and it does not provide over-arching guidance to be applied by the states. Instead, the *Merger Order* adopts specific "conditions and commitments" that are "enforceable by the FCC . . . ."[48] There is no legal, policy, or business reason that these specific conditions and commitments should be interpreted to mean one thing in one state and other things in other states, and Sprint's positions during the hearing bear this out.[49]

Sprint's position during the hearing was that carriers "want to keep a regional agreement" and that "in reality, carriers want that uniformity."[50] Sprint further explained its position that carriers "want to operate under one agreement" and that "in

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[48] *Merger Order* (Appendix F), p. 147 (emphases added).

[49] Already, different state Commissions are approaching this matter slightly differently. As noted above, the Florida Commission ruled that Sprint cannot raise its issue in a Section 252 arbitration proceeding. During its September 10, 2007 Conference Agenda, however, the Tennessee Regulatory Authority voted, without oral argument, that it would address both Sprint's issue and AT&T's issue in its arbitration proceeding. Again, there is no reason for this single federal Merger Commitment to be approached differently in multiple states.

[50] Tr. at 186.

Sprint's experience, that's what happens."[51] The uniformity that Sprint (as well as AT&T South Carolina) seeks can best be achieved by having Sprint present its issue to the FCC and not to multiple state Commissions.

Further, Sprint stated its position that "you can say there was a quid pro quo of sorts exchanged between the FCC and AT&T, in return for AT&T's merger commitments."[52] As explained in Subsection II.D below, in the context of this proceeding, what was "exchanged" clearly was a commitment to extend Sprint's 2001 interconnection agreement three years beyond the expiration of the fixed term of that agreement on December 31, 2004. Sprint, however, apparently believes the substance of the "exchange" needs to be clarified or interpreted. Judicial economy, uniformity, and certainty all are best served by letting the FCC provide any necessary clarification or interpretation of what was involved in this exchange (if Sprint chooses to ask the FCC to do so) and not by having multiple state Commissions guess as to what the FCC thought it exchanged with AT&T by way of the Merger Commitment.

This is, in essence, the approach that is being pursued in Louisiana. The Louisiana Staff filed a motion to hold the arbitration proceedings in that State in abeyance while the Louisiana Staff asks the FCC to decide whether Sprint's interpretation of the Merger Commitment is correct. On September 7, 2007, the administrative law judge ("ALJ") in Louisiana entered an Order granting Staff's request.[53] Specifically, the ALJ held the Louisiana proceedings in abeyance "for ninety (90) days . . . pending [FCC] resolution of the issues as to the commencement date for

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51 *Id.* at 186-187.

52 Tr. at 8.

53 Attachment C to this Brief is a copy of that Order.

computation of the three year extension of existing interconnection agreements authorized under the Merger Commitment . . . ."[54] The ALJ found that "multiple trials and appeals are likely to be somewhat burdensome to the parties and the various commissions" and noted the possibility "for concentration of effort and judicial efficiency" inherent in approving the Louisiana Staff's request. Significantly, Cox Louisiana Telecom, LLC, supported this outcome in Louisiana.[55]

For all of these reasons, even if the Commission determines that it has jurisdiction to interpret the Merger Commitment the FCC adopted and said it would enforce, AT&T South Carolina respectfully submits that the Commission should decline to do so and, instead, direct Sprint to seek any clarification it believes is necessary from the FCC itself.

D. In the alternative, the plain language of the Merger Commitment shows that the three-year extension period for Sprint began on December 31, 2004.

While AT&T South Carolina respects Sprint's right to view the language of the Merger Commitment differently than AT&T views it, Sprint went much further in its testimony. Sprint accused AT&T South Carolina of "refus[ing] to honor its Merger Commitments,"[56] of "seek[ing] to reneg on its commitment,"[57] of "breaching its interconnection obligations under the Merger Commitments,"[58] and of "attempting to avoid that obligation with a far-fetched interpretation of its own commitment."[59] The testimony of Sprint's own witness during the hearing, however, makes it clear not only

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54 Attachment C at p. 1.
55 *Id.* at p. 3.
56 Tr. at 36 (Sprint Direct at 14).
57 Tr. at 46 (Sprint Rebuttal at 5).
58 Tr. at 56 (Sprint Rebuttal at 15).
59 Tr. at 61.

that AT&T's view of the Merger Commitment is a good faith interpretation, but also that it is the only interpretation that reasonably is supported by the plain language of the Merger Commitment. If the Commission decides to interpret the Merger Commitment, therefore, the Commission should find that it allows Sprint to extend its 2001 interconnection agreement three years from the expiration of the fixed term of that agreement on December 31, 2004.

The Merger Commitment that Sprint accuses AT&T South Carolina of "breaching" plainly states, in relevant part:

> [AT&T South Carolina] shall permit [Sprint] to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years . . . .[60]

The Merger Commitment does not anchor to the expiration of an agreement, to the termination of the "month-to-month" status of an agreement, or to the termination of any purported "evergreen" status of an agreement. Instead, the Merger Commitment unequivocally anchors to the "initial term" of an agreement, which is a fixed (as opposed to month-to-month or purportedly "evergreen") term. Sprint cannot dispute the significance of this distinction – its own witness testified during the hearing that "there is considerable difference between the expiration of an agreement and the expiration of a fixed term of an agreement."[61]

When asked about the 2001 interconnection agreement, Sprint's witness testified that "[t]he fixed term expired December 31, 2004 . . . ."[62] As applied to Sprint, therefore, the Merger Commitment anchors to the expiration of the initial, fixed term of

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60 *See* Hearing Exhibit 3 at p. 3, Item 4 (emphasis added).

61 Tr. at 61 (emphasis added).

62 Tr. at 67. *See also* Composite Hearing Exhibit 2 (PLF-3 at page 1 of 2).

the 2001 agreement on December 31, 2004, and the Merger Commitment allows Sprint a three-year extension from that date, or until December 31, 2007. AT&T has honored this Merger Commitment by offering to extend the 2001 agreement until December 31, 2007.[63]

In addition to the plain language of the Merger Commitment, sound policy considerations support AT&T's interpretation of the Merger Commitment. As explained in Section III of this Brief, the 2001 agreement is outdated, and AT&T South Carolina witness Scot Ferguson explained the adverse consequences that would arise from extending that outdated agreement until 2010 as Sprint proposes.[64] Mr. Ferguson also explained that Sprint's interpretation of the Merger Commitment is not consistent with the purpose of the Merger Commitment,[65] and he explained that AT&T is treating all similarly-situated carriers the same in applying its interpretation of the Merger Commitment.[66]

Finally, Sprint erroneously suggested during the hearing that the Alabama arbitration panel's decision that was entered into evidence as Hearing Exhibit 7 somehow supports Sprint's position in this proceeding.[67] The Alabama panel decision, however, has nothing to do with the Merger Commitment upon which Sprint relies. Instead, the Alabama panel decision addresses an entirely separate Merger Commitment that allows a carrier to port an "entire effective interconnection agreement" from one AT&T state into

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63 Tr. at 106.
64 Tr. at 104-106.
65 Tr. at 104.
66 Tr. at 137.
67 Tr. at 176-178. This decision by the arbitration panel in Alabama has not yet been approved by the Alabama Commission.

another AT&T state under certain conditions.[68] Nuvox sought to use that merger commitment to port an interconnection agreement from another state into Alabama. AT&T Alabama objected, relying on a First Circuit Court of Appeals opinion holding that a CLEC cannot seek arbitration of an interconnection agreement, obtain a ruling from a State commission, and subsequently adopt a pre-existing interconnection agreement that it views as preferable to the agreement the State commission ordered it to execute.[69] The Alabama arbitration panel determined that the First Circuit's opinion did not apply to the Nuvox arbitration proceedings in Alabama because "there has been no panel recommendation and no action [in the Nuvox arbitration proceeding] by the [Alabama] Commission."[70] This ruling does nothing whatsoever to support Sprint's erroneous interpretation of an entirely different Merger Commitment in this proceeding.

For the foregoing reasons, if the Commission decides to interpret the Commitment, it should find that it allows Sprint to extend its prior interconnection agreement three years from the expiration of the fixed term of that agreement on December 31, 2004.

II. UNLESS AND UNTIL THE FCC RULES TO THE CONTRARY, THE COMMISSION SHOULD ORDER SPRINT TO EXECUTE THE INTERCONNECTION AGREEMENT SUBMITTED BY AT&T SOUTH CAROLINA (INCLUDING AT&T SOUTH CAROLINA'S STANDARD ATTACHMENT 3) WITH AN EFFECTIVE DATE OF JANUARY 1, 2008.

There can be no legitimate dispute that the 2001 interconnection agreement is outdated. While the parties spent a good deal of time from mid-2004 to mid-2006 focusing on TRRO-related amendments to that agreement, Sprint's own witness concedes

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68 Hearing Exhibit 7 at pp. 1-2.

69 *Id.* at 2.

70 *Id.* at 4.

that beginning in approximately May 2006, Sprint and AT&T South Carolina "turned their attention back to and commenced negotiations regarding the non-UNE sections of the [new interconnection agreement]."[71] This aspect of the negotiations continued for approximately seven months and resulted in a tentative settlement that addressed several significant operational issues including shared facilities factors for various interconnection arrangements, reciprocal compensation, inter-MTA factors, VOIP, and which affiliates would be covered by the new agreement.[72] The considerable time and effort the parties spent addressing these operational issues is ample evidence of the outdated nature of the 2001 agreement. It is not surprising, therefore, that when Commissioner Howard asked "the 2001 interconnection agreement, it's pretty much out of date, isn't it," Sprint's witness did not deny it, but instead merely said "[w]ell, it is a long-standing agreement," and "Verizon seems to be okay with [Sprint] continuing" under older agreements in South Carolina.[73]

As AT&T witness Scot Ferguson explained, Sprint has not attempted to finalize any language in a new interconnection agreement since the Merger Commitment was announced.[74] Moreover, as AT&T witness Scott McPhee testified, Sprint has not asked the Commission to adopt any language to address the "three or four"[75] issues it contends remained unresolved during negotiations,[76] and it has neither presented any specific criticism of the contract language BellSouth has proposed nor offered the Commission

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71 Tr. at 31 (Sprint Direct at 9).
72 *See* Hearing Exhibit 4.
73 Tr. at 75-76.
74 Tr. at 112-13.
75 Tr. at 77-78.
76 Tr. at 182.

any alternative contract language to consider.[77] Instead, Sprint has chosen to rely solely on its erroneous interpretation of the Merger Commitment.

AT&T South Carolina is not willing voluntarily to allow Sprint's tactical decision not to propose any new contract language to, by default, perpetuate an outdated agreement. AT&T, therefore, responded to Sprint's Petition by asking the Commission to adopt specific contract language, as is its right under the federal Act.[78] AT&T's proposed language is the only contractual language that is before the Commission and, unless the Commission agrees with and adopts Sprint's interpretation of the Merger Commitment, nothing in the record would support a decision not to adopt the language proposed by AT&T South Carolina.[79]

AT&T South Carolina, therefore, respectfully asks the Commission to rule that unless and until the FCC affirmatively agrees with Sprint's interpretation of the Merger Commitment, Sprint must execute the interconnection agreement submitted by AT&T South Carolina (including AT&T South Carolina's standard Attachment 3)[80] with an effective date of January 1, 2008. This would give Sprint the benefit of the three-year

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77 Tr. at 183.

78 *See* 47 U.S.C. §252(b)(4)(C)("The State commission shall resolve each issue set forth in the petition and the response, if any . . . .")(emphasis added).

79 Again, Sprint could have presented language representing its position on the three or four issues it views as remaining open, it could have presented testimony addressing the language AT&T South Carolina has proposed, and it could have presented alternative language addressing any of the language AT&T South Carolina has proposed. Sprint's decision not take any of these actions should not hamstring AT&T South Carolina into continuing to operate under an outdated agreement in South Carolina.

80 AT&T's witness Scott McPhee's testimony that "numerous carriers have adopted AT&T's entire standard interconnection agreement offering (which included the same terms for Attachment 3 that AT&T proposes in this proceeding) and operate under those terms today" is evidence of the reasonableness of the terms and conditions of AT&T's standard Attachment 3. *See* Tr. at 149.

extension contemplated by the Merger Commitment while ensuring that the parties will operate under an updated agreement following the expiration of that extension.

CONCLUSION

For the foregoing reasons, AT&T South Carolina respectfully asks the Commission to dismiss Sprint's issue and to rule that unless and until the FCC affirmatively agrees with Sprint's interpretation of the Merger Commitment, Sprint must execute the interconnection agreement submitted by AT&T South Carolina (including AT&T South Carolina's standard Attachment 3) with an effective date of January 1, 2008

BELLSOUTH TELECOMMUNICATIONS, INC.,
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EXHIBIT A

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS for Arbitration of Rates, Terms, and Conditions of Interconnection with BellSouth Telecommunications, Inc., d/b/a/ AT&T South Carolina, d/b/a AT&T Southeast	)	Docket No. 2007-215-C

AT&T SOUTH CAROLINA'S PROPOSED ORDER

I. PROCEDURAL BACKGROUND

This matter comes before the Commission upon a Petition for Arbitration ("Petition") filed by Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS ("Sprint") pursuant to Section 252 of the federal Telecommunications Act of 1996. Sprint filed its Petition with the Commission on May 29, 2007. AT&T South Carolina filed its Motion to Dismiss and, in the Alternative, Answer ("Motion/Answer") on June 22, 2007, and Sprint filed its Response to the Motion/Answer on July 2, 2007. The Commission held AT&T South Carolina's Motion to Dismiss in abeyance and ordered the parties to proceed with the hearing on the merits of the case "in order to make a fully reasoned determination in this case."[1]

The Evidentiary Hearing in this matter was held on August 20, 2007. P. L. "Scot" Ferguson and J. Scott McPhee testified on behalf of AT&T South Carolina, and Mark G.

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[1] See Order Holding Motion to Dismiss in Abeyance, Order No. 2007-579 in Docket No. 2007-215-C (August 14, 2007).

Felton testified on behalf of Sprint. The Office of Regulatory Staff ("ORS") was represented by counsel but did not present a witness during the hearing. The Commission gave the Parties the opportunity to submit Post-Hearing Briefs and Proposed Orders by September 14, 2007. We have carefully reviewed these submissions, the evidence of record, and the controlling law, and this Order sets forth our rulings on AT&T's South Carolina's Motion to Dismiss, the issue Sprint presented in its Petition, and the issue AT&T South Carolina presented in its Motion/Answer.

II. LEGAL STANDARDS UNDER THE FEDERAL TELECOMMUNICATIONS ACT OF 1996

Sections 251 and 252 of the federal Act encourage negotiations between Parties to reach local interconnection agreements. Section 252(a) of the federal Act requires incumbent local exchange carriers ("ILECs") to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 251(c)(2)-(6). As part of the negotiation process, the 1996 Act allows a party to petition a state Commission for arbitration of unresolved issues.[2] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[3] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the Parties with respect to those issues; and (3) any other issues discussed and resolved by the Parties."[4] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the

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2 47 U.S.C. § 252(b)(2)

3 *See generally,* 47 U.S.C. §§ 252 (b)(2)(A) and 252 (b)(4).

4 47 U.S.C. § 252(b)(2).

Commission receives the petition.[5] The 1996 Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.[6]

III. FACTUAL BACKGROUND

Sprint and AT&T South Carolina currently operate under an interconnection agreement that became effective in 2001.[7] The initial, fixed term of the 2001 agreement expired December 31, 2004.[8] In 2004, Sprint and AT&T South Carolina began actively negotiating provisions of a subsequent interconnection agreement that would govern their operations in South Carolina on a going-forward basis.[9] During these negotiations, the parties have continued operating under the 2001 agreement on a month-to-month basis in order to avoid disruption of service to Sprint's end user customers.[10] On December 14, 2006, the parties reached a tentative settlement that each agreed was "a milestone," and the parties agreed that "final settlement is likely in the next few weeks."[11]

The parties, however, did not execute a new agreement. Shortly after the parties reached this tentative settlement, the Federal Communications Commission ("FCC") adopted and approved various Merger Commitments in its BellSouth/AT&T "Merger Order."[12] One of those Merger Commitments provides, in relevant part:

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5 47 U.S.C. § 252(b)(3).

6 47 U.S.C. § 252(b)(4).

7 Tr. at 94-96.

8 Tr. at 67; Tr. at 94; Composite Hearing Exhibit 2 (PLF-3 at page 1 of 2).

9 Tr. at 28 (page 6 of Sprint Direct); Tr. at 96.

10 Tr. at 78-79; Tr. at 81; Tr. at 95-96; Composite Hearing Exhibit 2 (PLF-3 at page 1 of 2).

11 Hearing Exhibit 4.

12 Memorandum Opinion and Order, *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, 22 F.C.C.R. 5662 at ¶222, Appendix F (March 26, 2007)("*Merger Order*").

> [AT&T South Carolina] shall permit [Sprint] to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years . . . .[13]

Relying on its interpretation of this Merger Commitment, Sprint stopped working on finalizing contract language consistent with the parties' negotiations and, instead, began pursuing an extension of the 2001 agreement into the year 2010.[14]

Sprint contends that this Merger Commitment allows it to extend the 2001 agreement three years from either Mach 20, 2007 (the date of its request for an extension) or from December 29, 2006 (the date of AT&T's letter to the FCC setting forth the commitment).[15] AT&T South Carolina agrees that the Merger Commitment allows Sprint to extend the 2001 agreement for three years, but AT&T South Carolina believes the extension begins when the initial term of the 2001 agreement expired on December 31, 2004. In other words, the parties disagree about when the parties will stop operating under the 2001 agreement and start operating under a new agreement in South Carolina.[16]

Accordingly, Sprint filed its Petition for Arbitration ("Petition") "[p]ursuant to Section 252(b) of the Telecommunications Act of 1996."[17] Sprint's Petition presents the sole issue of whether Sprint can extend the 2001 agreement for three years "from March 20, 2007 pursuant to Interconnection Merger Commitment No. 4."[18] AT&T South Carolina filed a Motion to Dismiss and, in the Alternative, Answer, challenging Sprint's ability to present its issue in this Section 252 proceeding and presenting AT&T South

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13 *See* Hearing Exhibit 3 at p. 3, Item 4.
14 Tr. at 112-113.
15 Tr. at 35-36 (Sprint direct at 13-14).
16 *See, e.g.,* Tr. at 6; Tr. at 67.
17 *See* Petition at p. 1.
18 Id. at p. 8.

Carolina's issue of whether the Commission should require Sprint to execute the agreement AT&T South Carolina has submitted for the Commission's consideration.[19] Sprint has not presented any specific concerns regarding any of the contract language AT&T South Carolina submitted, and Sprint has not presented any proposed contract language for the Commission's consideration.

III. DECISION ON AT&T SOUTH CAROLINA'S MOTION TO DISMISS AND ON SPRINT'S ISSUE

The Commission finds that Sprint cannot present its issue in this Section 252 arbitration proceeding. Even if that were not the case, the Commission finds that the FCC has exclusive jurisdiction to interpret and enforce the Merger Commitment upon which Sprint relies. Additionally, having the FCC (as opposed to multiple State commissions) address Sprint's issue promotes judicial economy, uniformity, and certainty. The Commission, therefore, grants AT&T South Carolina's Motion to Dismiss Sprint's issue, without prejudice to Sprint's ability to seek an interpretation of the Merger Commitment from the FCC.

A. Sprint cannot present its issue in this section 252 arbitration proceeding.

Not every issue that a party negotiating an interconnection agreement may attempt to present is subject to arbitration under the federal Act.[20] Instead, the federal Act provides that arbitration proceedings can only resolve "open issues" in a way that

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19 *See* Motion/Answer at ¶28 to end.

20 *See* Order Addressing Changes of Law, *In Re Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Order No. 2006-136 in Docket No. 2004-316-C at 6 (March 10, 2006)("Change of Law Order") (declining to allow various CLECs to present issues that arose under Section 271 of the Act in a Section 252 proceeding, finding that "Congress limited the Section 252 rate-setting, negotiation, arbitration, and approval process to Section 251 obligations.").

"meet[s] the requirements of Section 251 . . . ."[21] Thus, in addressing which types of issues can be arbitrated pursuant to Section 252, the Tenth Circuit Court of Appeals stated that "[b]ecause a CLEC may only compel arbitration of issues that the ILEC is under a duty to negotiate pursuant to § 251(c)(1), the "interconnection agreements" that result from arbitration necessarily include only the issues mandated by § 251(b) and (c)."[22] Likewise, the United States District Court for the District of Arizona recently held that the Arizona Commission could not "impose Section 271 requirements into an arbitrated [interconnection agreement] under Section 252 [because] Section 252 clearly states that state commissions are to resolve open issues by imposing conditions that meet the requirements of Section 251", and no such requirements are found in Section 251.[23]

The evidence of record reveals that the sole issue in Sprint's Petition – when do the parties stop operating under the 2001 agreement and start operating under a new agreement – is not an "open issue." During negotiations, the parties agreed to the effective date of a new agreement.[24] In other words, negotiations resulted in Sprint and AT&T South Carolina agreeing on the date upon which the parties would stop operating under the 2001 interconnection agreement and start operating under a new interconnection agreement.

Moreover, Sprint's witness confirmed during the hearing that the issue of

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21 47 U.S.C. § 251(c)(1).

22 *Qwest Corp. v. Public Utilities Com'n of Colorado*, 479 F.3d 1184, 1197 (10th Cir. 2007) (citing *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002)).

23 *Qwest Corp. v. Arizona Corporation Commission, et* al., 2007 WL 2068103, at *5. *See, also, DIECA Communications, Inc. v. Florida Public Service Commission*, 447 F.Supp.2d 1281, 1286 (N.D.Fla. 2006) (asserting that in accordance with the plain meaning of the statute, state commission resolution of issues in arbitration must be based on obligations under § 251).

24 *See* Hearing Exhibit 4.

extending the 2001 agreement for three years did not come up until after the parties already had agreed to an effective date of the new agreement during negotiations.[25] Sprint's witness also confirmed that the issue of extending the 2001 agreement did not arise as a result of anything that was discussed previously during negotiations but, instead, it "arose as a direct result, and solely as a direct result of the [subsequent] Merger Commitment."[26] We find, therefore, that the issue of extending the 2001 agreement is not an "open issue" in the negotiations but, instead, is an issue that arose outside the context of the negotiations and solely as a result of the Merger Commitment.[27]

As an additional basis for our dismissal of Sprint's issue, we find that Sprint's issue does not address a requirement of Section 251 of the federal Act. Sprint acknowledges that no language in Section 251 explicitly requires an ILEC like AT&T South Carolina to allow a CLEC like Sprint to extend an existing interconnection agreement by three years,[28] and it acknowledges that that no language in the 2001 interconnection agreement requires such an extension.[29] Moreover, Sprint's letter of March 20, 2007 to AT&T South Carolina is couched in terms of a "request pursuant to

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[25] *See* Tr. at 72, 82-83 (Sprint's witness testifying that the first time the issue of extending the 2001 agreement for three years came up was on "January 3rd [2007] or soon after that.").

[26] Tr. at 74.

[27] We also agree with the Florida Commission that the nature of the remedy sought by Sprint reveals that Sprint has not presented an "open issue" to the Commission. As the Florida Commission explained, "the nature of the remedy [Sprint seeks] is an enforcement of an allegedly known right, not a determination of an open issue to comport with the requirements of Section 251."*See* Order Granting Motion to Dismiss, *In re: Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast*, Order No. PSC-07-0680-FOF-TP in Docket No. 070249-TP at 4 (August 21, 2007)("Florida Order")(emphasis in original).

[28] Tr. at 65-66.

[29] Tr. at 66.

FCC approved AT&T/BellSouth Merger Commitment No. 4 to extend parties' Interconnection Agreement three years to March 19, 2010."[30] Similarly, Sprint's Petition frames the issue in terms of its request to extend the 2001 agreement for three years "from March 20, 2007 pursuant to Interconnection Merger Commitment No. 4."[31] As Sprint's witness acknowledged during the hearing, Sprint's issue "arose as a direct result, and solely as a direct result of the Merger Commitment"[32] and not as a result of any requirements of Section 251.

Sprint argues that it "considers the Merger Commitments to constitute AT&T South Carolina's latest offer for consideration within the parties' 251/252 negotiations that superseded or may be viewed in addition to any prior offers AT&T South Carolina had made . . . ."[33] We agree with the Florida Commission that "Sprint's theory for treating the enforcement of the particular Merger Commitment as an arbitration of an open Section 251 issue is, at best, awkward."[34] As was the case in the Florida proceeding, Sprint "offers no legal support for why the Merger Commitment 'must' be viewed as a 'standing offer' that automatically became inserted into Sprint's negotiations with AT&T."[35] Additionally, we find that it would be particularly inappropriate to view the Merger Commitment as a "latest" or "superseding" offer in this case because, as explained above, AT&T and Sprint already had agreed to the effective date of the new agreement.

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30 *See* Petition, Exhibit C (emphasis added).
31 Petition at p. 8 (emphasis added).
32 Tr. at 72.
33 Tr. at 33 (Sprint Direct at 11).
34 Florida Order at 5.
35 *Id.*

B. In the Alternative, the FCC has exclusive jurisdiction to interpret and enforce the Merger Commitment.

Even if Sprint could properly present its issue in a Section 252 arbitration proceeding, we find that the interpretation and enforcement of the federal Merger Commitment upon which Sprint relies falls under the exclusive jurisdiction of the FCC. The United States Supreme Court has held that the interpretation of a federal agency order, when issued pursuant to the federal agency's established regulatory authority, falls within the federal agency's jurisdiction.[36] This pronouncement clearly applies to the FCC's *Merger Order*. Accordingly, if Sprint desires interpretation or enforcement of the Merger Condition, it must seek such interpretation or enforcement from the FCC.

The FCC made this clear when it explicitly reserved its own jurisdiction over the merger commitments that it approved in its *Merger Order*. Specifically, the FCC stated that "[f]or the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC and would apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter."[37] Nowhere in the *Merger Order* does the FCC provide that the interpretation or administration of the Merger Commitments is to occur outside the FCC. We find this to be significant, because the FCC has included clear and unambiguous language in prior merger orders when it intended for State commissions to administer conditions set forth in those merger orders.[38]

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36 *Serv. Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 177 (1959).

37 *Merger Order* (Appendix F), p. 147.

38 In its Order approving the *GTE/Bell Atlantic* merger, for instance, the FCC expressly stated that "the Applicants also agree that they will not resist the efforts of state

C. In the alternative, judicial economy, uniformity, and certainty all are best served by having the FCC address Sprint's issue.

FCC Orders that address Section 251 requirements typically provide over-arching guidance that State commissions apply in order to reach state-by-state (and often, within a state, carrier-by-carrier) decisions on matters such as "impairment" and the appropriate rates for interconnection and unbundled network elements. In sharp contrast, the *Merger Order* does not address Section 251 requirements, and it does not provide over-arching guidance to be applied by the states. Instead, the *Merger Order* adopts specific "conditions and commitments" that are "enforceable by the FCC . . . ."[39]

We can discern no legal or policy reason that one of these specific conditions and commitments should be interpreted to mean one thing in one state and other things in other states. To the contrary, Sprint's position during the hearing was that carriers "want to keep a regional agreement" and that "in reality, carriers want that uniformity."[40] Sprint further explained its position that carriers "want to operate under one agreement" and that "in Sprint's experience, that's what happens."[41] We find that the uniformity that Sprint (as well as AT&T South Carolina) seeks can best be achieved by having Sprint present its issue to the FCC.

Additionally, Sprint stated its position that "you can say there was a quid pro quo of sorts exchanged between the FCC and AT&T, in return for AT&T's merger

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commissions to administer the conditions by arguing that the relevant state commission lacks the necessary authority or jurisdiction." *In the Matter of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control,* CC Docket No. 98-184, ¶348 (October 8, 1999).

[39] *Merger Order* (Appendix F), p. 147 (emphases added).

[40] Tr. at 186.

[41] *Id.* at 186-187.

commitments."[42] Given that it was the FCC, and not this Commission, that was a party to any such "exchange," we find that judicial economy, uniformity, and certainty all are best served by letting the FCC provide any necessary clarification or interpretation of what was involved in this exchange (if Sprint chooses to ask the FCC to do so).

Finally, Sprint has expressed concern that if it asks the FCC to interpret and enforce the Merger Commitment, the FCC might rule that the State commissions should do so instead.[43] We believe that such a ruling is highly unlikely in light of the FCC's clear pronouncement that "all conditions and commitments proposed in this letter are enforceable by the FCC. . . ."[44] Moreover, as noted above, the Commission finds that the FCC has exclusive jurisdiction to interpret the Merger Commitment. However, to the extent that it may be useful to the parties or to the FCC, the Commission's view is that the Merger Commitment allows Sprint to extend its 2001 interconnection agreement three years from the expiration of the fixed term of that agreement on December 31, 2004. The Merger Commitment states, in relevant part:

> [AT&T South Carolina] shall permit [Sprint] to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years . . . .[45]

We read the plain language of this Merger Commitment as anchoring to the expiration of the "initial term" of an agreement, which is a fixed (as opposed to month-to-month or purportedly "evergreen") term. This is significant because, as Sprint's witness testified during the hearing, "there is considerable difference between the expiration of an

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42 Tr. at 8.

43 *See* Tr. at 185.

44 *Merger Order* (Appendix F), p. 147.

45 *See* Hearing Exhibit 3 at p. 3, Item 4 (emphasis added).

agreement and the expiration of a fixed term of an agreement."[46] When asked about the 2001 interconnection agreement, Sprint's witness testified that "[t]he fixed term expired December 31, 2004 . . . ."[47] As applied to Sprint, therefore, we read the Merger Commitment as anchoring to the expiration of the initial, fixed term of the 2001 agreement on December 31, 2004, and as allowing Sprint a three-year extension from that date (or until December 31, 2007).

II. DECISION ON AT&T SOUTH CAROLINA'S ISSUE

We find that the 2001 interconnection agreement is outdated. While the parties spent a good deal of time from mid-2004 to mid-2006 focusing on TRRO-related amendments to that agreement, beginning in approximately May 2006, Sprint and AT&T South Carolina "turned their attention back to and commenced negotiations regarding the non-UNE sections of the [new interconnection agreement]."[48] This aspect of the negotiations continued for approximately seven months and resulted in a tentative settlement that addressed several significant operational issues including shared facilities factors for various interconnection arrangements, reciprocal compensation, inter-MTA factors, VOIP, and which affiliates would be covered by the new agreement.[49] The considerable time and effort the parties spent addressing these operational issues is ample evidence of the outdated nature of the 2001 agreement.

Since the Merger Commitment was announced, Sprint has not attempted to finalize language in a new interconnection agreement.[50] Moreover, Sprint's Petition does

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46 Tr. at 61.
47 Tr. at 67. *See also* Composite Hearing Exhibit 2 (PLF-3 at page 1 of 2).
48 Tr. at 31 (Sprint Direct at 9).
49 *See* Hearing Exhibit 4.
50 Tr. at 112-13.

not ask the Commission to adopt any language to address the "three or four"[51] issues Sprint contends remained unresolved during negotiations.[52] AT&T South Carolina, on the other hand, responded to Sprint's Petition by asking the Commission to adopt specific contract language, as is its right under the federal Act.[53] In its Post-Hearing Brief, AT&T South Carolina explains that it did so because it "is not willing voluntarily to allow Sprint's tactical decision not to propose any new contract language to, by default, perpetuate an outdated agreement."

Sprint, however, has not presented any specific criticism of the contract language AT&T South Carolina has proposed. Nor has Sprint offered the Commission any alternative contract language to consider.[54] Instead, Sprint has chosen to continue to rely solely on its interpretation of the Merger Commitment. AT&T's proposed language, therefore, is the only contractual language that is before the Commission, and we find nothing in the record to suggest that we should not adopt the language AT&T South Carolina has proposed.[55]

For these reasons, we find that unless and until the FCC affirmatively agrees with Sprint's interpretation of the Merger Commitment, Sprint must execute the interconnection agreement submitted by AT&T South Carolina (including AT&T South

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51 Tr. at 77-78.

52 Tr. at 82.

53 *See* 47 U.S.C. §252(b)(4)(C)("The State commission shall resolve each issue set forth in the petition and the response, if any . . . .")(emphasis added).

54 Tr. at 183.

55 Again, Sprint could have presented language representing its position on the three or four issues it views as remaining open, it could have presented testimony addressing the language AT&T South Carolina has proposed, and it could have presented alternative language addressing any of the language AT&T South Carolina has proposed. We agree with AT&T's position in its Post-Hearing Brief that "Sprint's decision not to take any of these actions should not hamstring AT&T South Carolina into continuing to operate under an outdated agreement in South Carolina."

Carolina's standard Attachment 3)[56] with an effective date of January 1, 2008. This gives Sprint the benefit of the three-year extension contemplated by the Merger Commitment[57] while ensuring that the parties will operate under an updated agreement following the expiration of that extension.

---

[56] AT&T's witness Scott McPhee's testimony that "numerous carriers have adopted AT&T's entire standard interconnection agreement offering (which included the same terms for Attachment 3 that AT&T proposes in the proceeding) and operate under those terms today" is evidence of the reasonableness of the terms and conditions of AT&T's standard Attachment 3. *See* Tr. at 149.

[57] AT&T's witness testified that it has honored the Merger Commitment by offering to extend the 2001 agreement until December 31, 2007. Tr. at 106.

CONCLUSION

Based on the foregoing, it is hereby ordered that:

1. AT&T South Carolina's Motion to Dismiss Sprint's issue is granted;

2. Unless and until the FCC affirmatively agrees with Sprint's interpretation of the Merger Commitment, Sprint must execute the interconnection agreement submitted by AT&T South Carolina (including AT&T South Carolina's standard Attachment 3) with an effective date of January 1, 2008; and

3. The Parties shall execute and file the interconnection agreement with the Commission within sixty (60) days after receipt of this Order.

This Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

_____

G. O'Neal Hamilton, Chairman

ATTEST:

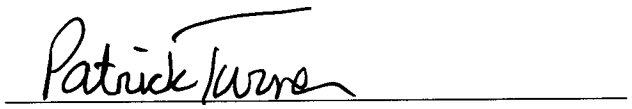
_____

C. Robert Moseley, Vice Chairman

(SEAL)

Respectfully submitted on this the 14th day of September, 2007.

BELLSOUTH TELECOMMUNICATIONS, INC.,
d/b/a AT&T SOUTH CAROLINA



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690592

EXHIBIT B

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast.	DOCKET NO. 070249-TP ORDER NO. PSC-07-0680-FOF-TP ISSUED: August 21, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

Case Background

On April 6, 2007, Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS (Sprint) filed a Petition for Arbitration (Petition) of a single issue in its Interconnection Agreement (ICA) with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) under Section 252(b) of the Telecommunications Act of 1996 (Act). Section 252 (b)(1) of the Act sets forth the procedures for petitioning a state commission to arbitrate "any open issues." Section 251 provides the framework for negotiation or arbitration of ICAs.

In its Petition, Sprint stated that the single issue, a three-year extension of its ICA, involves the voluntary Merger Commitments filed with the Federal Communications Commission (FCC) that were incorporated into the FCC's approval of the AT&T Inc. and BellSouth Corporation Application for Transfer of Control. The merger closed on December 29, 2006. On March 26, 2007, the FCC released its Order, FCC 06-189, authorizing the merger.

On May 1, 2007, AT&T filed a Motion To Dismiss and Answer (Motion to Dismiss). In its Motion to Dismiss, AT&T argued that the matter in dispute between it and Sprint was not one that arose as an issue subject to arbitration under Section 252 and that the FCC has sole jurisdiction over the Merger Commitments.

On May 2, 2007, Sprint filed an unopposed request for an extension of time to file its response to the Motion to Dismiss. The request was granted by Order No. PSC-07-0401-PCO-TP, issued May 8, 2007. On May 15, 2007, Sprint timely filed its Response to AT&T's Motion to Dismiss (Response). Sprint opined that we have concurrent jurisdiction under the Act and Section 364.162, Florida Statutes, to arbitrate the commencement date of the three-year extension.

This matter now is before us solely for purpose of resolving AT&T's Motion to Dismiss. AT&T's Motion to Dismiss and Answer also plead denials, an affirmative defense, and alternative issues to be determined by we. These aspects of the pleading are not germane to the Motion to Dismiss and are not addressed in this order.

Discussion

In this order, we grant AT&T's Motion to Dismiss because Sprint is requesting that we enforce an allegedly known right (the Merger Commitments as interpreted by Sprint) under an FCC order as opposed to arbitrating an "open" issue concerning Section 251 obligations.

Analysis and Discussion:

I. STANDARD OF REVIEW

Under Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

In its motion, AT&T argues that we lack subject matter jurisdiction to arbitrate because the Merger Commitment at issue is not a "Section 251 Arbitration Issue." Lack of subject matter jurisdiction may be properly asserted in a motion to dismiss. See Fla. R. Civ. P. 1.140(b). Florida courts regularly review arguments concerning subject matter jurisdiction on motions to dismiss. See, e.g., Bradshaw v. Ultra-Tech Enters., Inc., 747 So. 2d 1008, 1009 (Fla. 2d DCA 1999) (affirming dismissal of complaint based on ERISA preemption of state law); Doe v. Am. Online, Inc., 718 So. 2d 385, 388 (Fla. 4th DCA 1998) (rejecting the argument that a federal preemption defense constituted an affirmative defense that should have been raised in an answer, not on a motion to dismiss); Bankers, 697 So. 2d at 160 (addressing an issue raised in defendant's motion to dismiss regarding federal preemption of plaintiff's claims).

AT&T argues that interpretation and enforcement of the Merger Commitments are within the exclusive purview of the FCC. This is a preemption argument. We note that Florida courts, including the Florida Supreme Court, have held that the issue of federal preemption is a question of subject matter jurisdiction. Boca Burger, Inc. v. Richard Forum, 2005 Fla. LEXIS 1449; 30 Fla. Law Weekly S 539 (Fla. July 7, 2005); citing Jacobs Wind Elec. Co. v. Dep't of Transp., 626 So. 2d 1333, 1335 (Fla. 1993); Bankers Risk Mgmt. Servs., Inc. v. Av-Med Managed Care, Inc., 697 So. 2d 158, 160 (Fla. 2d DCA 1997); Fla. Auto. Dealers Indus. Benefit Trust v. Small, 592 So. 2d 1179, 1183 (Fla. 1st DCA 1992).

In sum, in ruling on the Motion to Dismiss we do have jurisdiction to determine whether we have subject matter jurisdiction, and this may include a review of the Merger Commitments as established by the FCC Order.

II. ARGUMENTS

A. Sprint's Argument

Sprint's Petition identifies the issue to be arbitrated as follows:

> ISSUE 1: May AT&T Southeast effectively deny Sprint's request to extend its current Interconnection Agreement for three full years from March 20, 2007, pursuant to Interconnection Merger Commitment No. 4? [Petition, p. 8.]

Sprint's Response provides a useful summary of its Petition and the elements of the claim for relief.

> Sprint's Petition seeks to implement an amendment to convert and extend its current month-to-month Interconnection Agreement ("ICA") with AT&T to a fixed 3-year term. The amendment arises from Sprint's acceptance of an AT&T, Inc. and BellSouth Corporation proposed "Merger Commitment" that became a "Condition" of approval by the Federal Communications Commission ("FCC") of the AT&T/BellSouth merger when the FCC authorized the merger. [Response, pp. 1, 2].

Sprint further argues that,

> The interconnection-related Merger Commitments must be viewed as a standing offer by AT&T which, as of December 29, 2006, became part of any new or ongoing AT&T negotiations with any carrier regarding interconnection under the Act. The specific condition at issue here is that AT&T "shall permit a requesting telecommunications carrier to extend its current interconnection agreement . . . for a period of up to three years." . . . This is the offer that AT&T was required to make as a matter of law and this is the offer that was accepted by Sprint during the parties' statutory 251-252 negotiations for a new agreement. Sprint's Petition makes it clear that the single issue pertaining to the amendment is establishment

of essential ICA terms related to the 3-year extension, with the specific disputed term being when the 3-year extension commences. [Response, pp. 2, 3]

B. AT&T's Argument

AT&T argues that "(t) he merger commitment is not a requirement of Section 251." [Motion to Dismiss, p. 2] Consequently, the issue raised by Sprint is "not a Section 251 Arbitration Issue." AT&T also argues that the "merger commitment" issue "was not discussed in the context of the parties' negotiations of a new interconnection agreement." AT&T states that "Sprint's attempt to frame the merger commitment as an arbitrable issue is an affront to the plain, clear, and unambiguous language contained in the Act. Given that Sprint's Petition contains solely this one non-arbitrable issue, Sprint's issue should be dismissed."

AT&T also contends that the petition should be dismissed because we allegedly have no jurisdiction to address the meaning of the Merger Commitment. According to AT&T, "(t)he FCC has the sole authority to interpret, clarify or enforce any issue involving Merger Commitments set forth in its Merger Order." [Motion to Dismiss, p. 2] AT&T adds that this approach ensures a "uniform regulatory framework" for handling post-merger issues.

III. ANALYSIS

Section 251 of the Telecommunications Act, *inter alia*, imposes upon ILECs certain duties of interconnection and resale. Section 252(a) provides for establishing interconnection agreements through negotiation. Section 252(b) provides the framework for establishing interconnection agreements through compulsory arbitration, as opposed to negotiation. Simplifying, under Section 252(b)(1) a carrier "may petition a State commission to arbitrate any ***open issues***" (emphasis added) while under Section 252(c). We must ensure, inter alia, that our decisions "meet the requirements of Section 251" and regulations prescribed pursuant to that Section. Thus, our jurisdiction to arbitrate any open issues properly brought before it relating to the interconnection agreements created under Section 252 to meet the duties of ILECs under Section 251.

The dispositive question placed before us in the instant dispute is whether the issue Sprint seeks to arbitrate is an "open issue" arising out of the negotiations within the framework of Sections 251 and 252. If so, our jurisdiction under Section 252 is properly invoked; if not, our jurisdiction is not properly invoked and the petition must be dismissed.

The nature of the remedy sought in an action often reveals the nature of the issue presented and the jurisdiction invoked. In this case, the remedy sought by Sprint is the enforcement of an FCC order as Sprint interprets it. Specifically, Sprint seeks to enforce through arbitration one of the Merger Commitments. By analogy to civil suit, Sprint is like a third-party beneficiary seeking to enforce a contract between AT&T and the FCC as memorialized in the FCC's order. Thus, the nature of the remedy is an enforcement of an allegedly *known right*, not a determination of an *open issue* to comport with the requirements of Section 251. For this

reason, Sprint is not seeking arbitration of an open Section 251 issue, and thus its petition should be dismissed.

Sprint's theory for treating the enforcement of the particular Merger Commitment as an arbitration of an open Section 251 issue is, at best, awkward. Sprint argues as follows:

> The interconnection-related Merger Commitments must be viewed as a standing offer by AT&T which, as of December 29, 2006, became part of any new or ongoing AT&T negotiations with any carrier regarding interconnection under the Act. [Response, p. 2]

Sprint, however, offers no legal support for why the Merger Commitments "must" be viewed as a "standing offer" that automatically became inserted into Sprint's negotiations with AT&T. As suggested above, one could see the Merger Commitments as establishing a third-party's rights to an extension, which is different than establishing a negotiable offer under Section 251. Moreover, even if one treats the Merger Commitments as an offer, AT&T counters that it offered something different than Sprint accepted. This is a classic "meeting-of-the-minds" contract formation problem, which as presented is not a Section 251 issue either.

In rejecting Sprint's attempt to arbitrate the Merger Commitments as pled, we do not suggest that interpreting and enforcing the Merger Commitments are off limits to us in all circumstances. There may be situations in which such interpretation and enforcement are inextricably intertwined with open issues being arbitrated under either Section 252 or Section 364.162, Florida Statutes, or both. In those situations it would be within our subject matter jurisdiction to arbitrate the conflicting views. Moreover, we also stress that we make no ruling with respect to the merits of the competing interpretations of the particular Merger Commitments. Our ruling is simply that Sprint's petition must be dismissed because it seeks to enforce the particular Merger Commitments as a known right, not arbitrate it as an open, Section 251 issue.

IV. CONCLUSION

For the reasons provided above, Sprint's petition is dismissed for failure to state a claim for which we may grant relief. More specifically, as pled by Sprint, we do not have jurisdiction to enforce Sprint's putative right to a certain extension under the Merger Commitments through arbitration as though it were an "open issue" within the meaning of Section 252(b) of the Telecommunications Act. We acknowledge that under some circumstances, enforcement of an FCC order or regulations may be inextricably intertwined with determining matters normally subject to our jurisdiction and thus permissible. Moreover, we reiterate that we express no opinion on the merits of the competing interpretations of the particular Merger Commitment.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition for Arbitration of a single issue in its Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) under Section 252(b) of the Telecommunications Act of 1996 (Act) filed by Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS (Sprint), is hereby ***dismissed;***

ORDERED that the findings made in the body of this Order are hereby approved in every respect. It is further

ORDERED, that this docket shall remain open pending resolution of any motions for reconsideration or other post-decision pleadings that may be filed by the parties.

By ORDER of the Florida Public Service Commission this 21st day of August, 2007.

ANN COLE
Commission Clerk

(SEAL)

PKW

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

EXHIBIT C

LOUISIANA PUBLIC SERVICE COMMISSION
ADMINISTRATIVE HEARINGS DIVISION

DOCKET NO. U-30179

SPRINT COMMUNICATIONS COMPANY LP AND SPRINT SPECTRUM LP D/B/A SPRINT PCS, EX PARTE

In re: Petition of Sprint Communications Company, LP and Sprint Spectrum LP d/b/a Sprint PCS for Arbitration of Rates, Term and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana d/b/a AT&T Southeast.

RULING ON COMMISSION STAFF'S MOTION TO HOLD PROCEEDING IN ABEYANCE

HAVING CONSIDERED the Motion of the Louisiana Public Service Commission Staff ("Staff") to Hold Proceeding in Abeyance and BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana's ("AT&T"), Sprint Communications Company, LP and Sprint Spectrum LP d/b/a Sprint PCS' ("Sprint") and Cox Louisiana Telcom, LLC's ("Cox") Responses thereto, and for the reasons provided below:

IT IS HEREBY ORDERED that the Motion filed by Commission Staff is GRANTED, on a limited basis with the result that the proceeding in Docket No. U-30179 will be held in abeyance for ninety (90) days, (until December 7, 2007), pending Federal Communication Commission ("FCC") resolution of the issue as to the commencement date for computation of the three year extension of existing interconnection agreements authorized under the Merger Commitment Agreement, after which time Parties are free to re-urge their positions regarding Louisiana Public Service Commission's ("LPSC" or "Commission") resolution of the matter.

Background

On June 21, 2007 Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS ("Sprint") filed a Petition for Arbitration. Notice of the proceeding was published in the June 29, 2007 edition of the Commission's Official Bulletin. Interventions were filed by BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana ("AT&T"), Cox Louisiana Telcom, LLC ("Cox") and the Small Company Committee of the Louisiana Telecommunications Association ("SCC"). On July 16, 2007 AT&T filed its Answer and Exception of Lack of Jurisdiction. On July 27, 2007 AT&T filed a Motion to Strike or Alternatively, to Limit Participation of Intervenor Cox Louisiana Telcom, LLC. On August 10, 2007 the Louisiana Public Service Commission ("Commission") Staff filed a Motion to Hold Proceeding in Abeyance. On August 17, 2007 Sprint, AT&T and Cox filed comments in response to Commission Staff's motion.

Parties Positions

Commission Staff

The Commission Staff stated in its Motion to Hold Proceeding in Abeyance that after reviewing the filings in this proceeding, as well as action taken in other jurisdictions on this matter, the Commission Staff has "determined that the best course of action would entail the Commission asking the FCC to clarify when the 'three-year period' was intended to commence." The Commission Staff informed that its conclusion is based on the Commission's prior experience addressing issues the result of ambiguities and uncertainties in FCC Orders. The Commission Staff contends that as the interpretation of the time period will impact other carriers besides the parties to the current docket, it would be beneficial to have the FCC's clarification or

interpretation on the matter. The Commission Staff argues that proceeding with the matter "would result in a misuse of the Commission and the parties resources – the very result the Commission seeks to avoid by attempting to have the FCC weigh in on the issue." The motion explains that by asking the FCC for clarification the Commission is in no way asserting that it has no jurisdiction over the pending matter.

AT&T

AT&T states that it supports the Commission Staff's Motion to Hold Proceeding in Abeyance, and that the granting of the motion would "conserve the resources of this Commission and avoid the possibility of conflicting orders and piecemeal litigation."

Cox

Cox informs that it supports the Commission Staff's intent to seek clarification from the FCC as to the interpretation and application of Interconnection Merger Commitment No. 4. Cox alleges that the Commission's interpretation of the "three-year period" will impact other carriers, besides the parties in this docket, seeking an extension pursuant to the Merger Commitment. Cox points out the possible unnecessary drain of repeated proceedings and appeals, and argues that the current proceedings should be held in abeyance until an appropriate response is received form the FCC.

Sprint

Sprint contests the Commission Staff's Motion to Hold Proceeding in Abeyance, and asserts that no further clarification is warranted in this case. Sprint contends that an unnecessary,

uncertain and non-time bound delay to wait for FCC clarification "establishes a harmful precedent that may encourage rather than discourage future AT&T efforts to delay any carrier, Staff or consumer dispute that may touch upon a Merger Commitment." Sprint argues that the Commission is the entity to interpret and implement the Merger Commitments in a way that is consistent with the commitment and continues to encourage competition. Sprint points out that delaying the proceeding for FCC clarification "that may or may not be given and, if indeed is given, who knows when, exacerbates the untenable position that Sprint and other requesting carriers find themselves". Sprint contends that AT&T might use the delay as a reason to find that Sprint's related affiliates cannot adopt the Sprint Interconnection Agreement while the term is being litigated before the Commission or the FCC. Sprint argues that the delay invites AT&T to "delay resolution of future disputes by attempting to push any and all disputes to the FCC for 'clarification' whenever the magic words 'Merger Commitment' touch the dispute."

Analysis and Conclusion

Staff has requested that Docket No. U-30186 be held in abeyance in order to allow time for a clarification from the Federal Communications Commission ("FCC") on Staff's Request for Declaratory Judgment as regards the commencement day for figuring the three year extension period for existing interconnection agreements which is authorized under the Merger Commitment Agreement. Staff contends that such a course of action conserves resources and, as an interpretation of the time period will impact other carriers besides the parties to the current docket, it would be beneficial to have the FCC's clarification or interpretation on the matter.

It is the case that raising an issue as to the commencement of the authorized three-year extension of interconnection agreements is not likely to be an isolated instance. An

interpretation of the three-year period will impact not only current parties, but also other carriers within Louisiana as well as in other areas. It is a region wide issue, at least in the nine states of the former BellSouth region. There is apparently the possibility of disparate results from the various states within the nine-state region. For example, Florida dismissed both Sprint's Petition and AT&T additional issues, stating that "because Sprint is requesting the Commission enforce an allegedly known right (the Merger Commitments as interpreted by Sprint) under an FCC order as opposed to arbitrating an 'open' issue concerning Section 251 obligations." North Carolina, on the other hand, has set the matter for hearing, finding that there was, "good cause to schedule an evidentiary hearing immediately followed by an oral argument" on whether the Commission has jurisdiction (the hearing has been held, a transcript made available on July 21, 2007, and briefs are due on September 20, 2007). There is the probability of multiple appeals on various levels to various forums. It is not unlikely that some party may seek to bring the matter before the FCC at some point. The multiple trials and appeals are likely to be somewhat burdensome to the parties and the various commissions. It does seem that there is a possible opportunity here for concentration of effort and judicial efficiency.

There is the possibility of a quick response from the FCC in this instance. The FCC has already approved the Merger Commitment and likely has an understanding of the date or event from which the three-year extension period is to be computed. It does not appear likely that a lengthy analysis would necessarily be required on the limited issue of computation of the commencement date of the three year extension period for existing interconnection agreements, as the Merger Commitment includes already the statement that a post-merger AT&T/BellSouth entity "shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period up to three years,

subject to amendment to reflect prior and future changes of law." The Parties are in agreement that Sprint is entitled to a three year extension under the FCC's approval of the Merger Commitment, but differ as to the date from which the three years should be computed.

On the other hand, Sprint has expressed very real distress at the possibility of an open-ended stay and the problems created thereby. This Tribunal is concerned as to whether a Request for Declaratory Order has in fact even been filed with the FCC as, of yet, no copy of Staff's Request for Declaratory Order has been filed in Docket No. U-30179. Under the terms of the Merger Commitment, the right to a three year extension of existing interconnection agreements is of limited duration and sunsets forty-two (42) months from the approval of the Merger Commitment (December 29, 2006). While it is hoped that a speedy response may be forthcoming from the FCC on the date from which the three year extensions should be calculated, it may be that either the FCC sends it back for State consideration or, that a decision from the FCC is delayed for a considerable period of time. Conceivably a response from the FCC might not be forthcoming until all, or a substantial portion of, the period available for extension had expired. Sprint and other similarly situated carriers are in a difficult position. In this instance the passage of time may work to detriment of one position and the advantage of the other. As Sprint points out, in the instance of a non-time bound referral to FCC -- justice delayed too long may mean no useful resolution.

A rapid response system is already provided for in the form of State resolution of Section 251 / 252 matters. Due to the Telecommunications Act, FCC regulation and existing structures in place, the LPSC may be in a position to timely resolve the matter. It is intended that interconnection issues be dealt with in an expedited manner to facilitate competition and smooth functioning of the industry.

Failure to quickly resolve the matter has already begun to cause problems, including for example, the issue raised in Docket No. U-30186, Nextel South Corp., ex parte, In re: Petition for Approval of Nextel South Corp's Adoption of the Interconnection Agreement between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana d/b/a AT&T Southeast. To unduly delay a decision may be to cause collateral problems. Given the circumstances, the most reasonable approach appears to be to grant Staff's Motion for Abeyance, but only on a limited basis. A relatively short stay may allow for gaining the benefits of consistency and judicial economy that a FCC clarification could provide, without risking possibly mooting the issue to be decided. Therefore, the Motion filed by Commission Staff should be granted on a limited basis.

Baton Rouge, Louisiana, this 7th day of September, 2007.

Carolyn L. DeVitis
Administrative Law Judge

cc: Official Service List
via: U.S. Mail and Fax

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STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for AT&T South Carolina ("AT&T") and that she has caused AT&T South Carolina's Post-Hearing Brief in Docket No. 2007-215-C to be served upon the following on September 14, 2007.

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